

IN THE INCOME-TAX APPELLATE TRIBUNAL “G” BENCH MUMBAI
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI S. RIFAUR REHMAN, ACCOUNTANT MEMBER

ITA No. 1305/Mum/2017 (Assessment Year 2008-09)

Sanjeev Mukhija 154/155, Kewal Industrial Estate, Senapati Bapat Marg, Lower Parel (W), Mumbai-400013 PAN: ADDPM4155C	Vs.	DCIT Central Circle-5 (Now DCIT, CC-1(4), Old CGO Bldg, Room No. 901, Annex, 9 th Floor, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri A.K. Ghosh (AR)
Respondent by : Shri V. Vinod Kumar (Sr. DR)

Date of Hearing : 14.01.2020
Date of Pronouncement : 14.01.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. CIT(A)-47, Mumbai dated 30.11.2016, which arises from against the penalty levied under section 271(1)(c) dated 29.08.2017 for Assessment Year 2008-09.
2. Brief facts of the case are that the assessee is an individual and was Director in M/s Golden Seam Textiles Pvt. Ltd. A search and seizure action was conducted under section 132 on 11.01.2012 in case of M/s Mandhana Industries Ltd. A survey action was conducted under section 133A in case of M/s Golden Seam Textiles Pvt. Ltd. During the course of survey, a Red colour diary was seized vide Annexure A/GST/1 on

11.01.2012. The seized diary belonging to the assessee. In the diary certain cash entries consisting of Rs. 9 Lacs against the names of Radhika, Minal and Ritu and Rs. 6 Lacs against the names of Tej and Sudha was recorded. The statement of assessee was recorded under section 131 on 27.04.2012 wherein the assessee admitted the additional income of Rs. 15 Lacs, received on sale of residential property in Jaipur and the cash component was paid towards purchase of five residential properties in Bangalore.

3. A notice under section 153C was served upon the assessee on 02.12.2013. In response to the notice under section 153C, the assessee filed return of income on 04.02.2014 declaring total income of Rs. 82,67,975/-. The Assessing Officer after serving statutory notice under section 143(2) and 141(1) completed the assessment on 27.03.2014 accepting the return of income of Rs. 82,67,975/- and initiated the penalty under section 271(1)(c). Show cause notice under section 274 r.w.s 271(1)(c) was issued to the assessee. The assessee filed its reply in response to the said show cause notice. The reply filed by assessee was not accepted by Assessing Officer. The Assessing Officer concluded that it is proved that assessee has furnished the inaccurate particulars and concealed its income and that the case of assessee is covered by Explanation 5A to section 271(1)(c) of the I.T. Act. The Assessing Officer levied the penalty @ 100% of tax sought to be

evaded. The Assessing Officer computed the penalty of Rs. 5,09,850/- vide its order dated 29.04.2014. On appeal before the ld. CIT(A), the action of Assessing Officer in levying the penalty was upheld. Thus, further aggrieved by the order of ld. CIT(A), the assessee has filed the present appeal before this Tribunal by raising the following grounds of appeal:

1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in passing ex-parte order without affording reasonable opportunity of hearing.
 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the penalty of Rs. 5,09,850/- levied by the AO u/s 271(1)(c) despite the fact that the Ld. AO neither in the show cause notice nor in the assessment order specified under which charge he is contemplating to levy penalty.
2. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. At the outset of hearing, the ld. AR of the assessee submits that he is not pressing the Ground No.1. Considering the submission of ld. AR of the assessee, Ground No.1 which relates to denial of reasonable opportunity by ld. CIT(A) is dismissed as not pressed.
3. Ground No.2 relates to levy of penalty under section 271(1)(c). the ld AR for the assessee submits that a regular assessment order under section 143(3) for AY 2008-09 was passed assessing total income of

assessee at Rs. 67,67,890/-. The Id. AR of the assessee submits that a search action was carried out on Mandhana Industries Ltd. A survey was conducted on M/s Golden Seam Textiles Pvt. Ltd. During the course of survey, a diary was impounded containing various entries in the name of Vaishali, Radhika, Minal, Ritu, Tej & Sudha showing cash entry against their names. The statement of assessee was recorded on 27.04.2012. The Id. AR of the assessee placed on record the copy of statement recorded under section 131 by Investigating Team. The Id. AR of the assessee submits that during the statement, the assessee disclosed the additional income of Rs. 15 Lacs. The Id. AR of the assessee further submits that a notice under section 153C was served upon the assessee on 02.012.2013. In response to the notice, the assessee filed return of income on 04.02.2014 declaring income of Rs. 82,67,975/- (67,67,890/- + 15,00,000/-). The return income was accepted by Assessing Officer without any variance, while passing the assessment order under section 143(3) r.w.s 153C dated 27.03.2014. The Id. AR of the assessee further submits that only a survey action was carried out at the assessee. A search was carried out in case of Mandhana Industries Ltd. Notice under section 153C was not valid against the assessee as no incriminating material was unearthed against the assessee in the search carried out on Mandhana Industries Ltd. Though the notice under section 153C was not valid against. The

assessee has not challenged the validity of notice under section 153C and that return of income in response to notice under section 153C was filed due to ignorance. The ld. AR of the assessee further submits that the assessee neither furnished inaccurate particulars of income nor concealed any income. The assessee disclosed additional income of Rs. 15 lacks during the survey and offered the same while filing return of income. The Assessing Officer while passing the assessment order has not specified the limb of charges as to whether the penalty is initiated for concealment of income or furnishing inaccurate particulars of income. The ld. CIT(A) while passing the penalty order, passed the order by invoking the provision of Explanation 5A to section 271(1)(c). The provision of Explanation 5A is not applicable in the present case. In support of his submission, the ld. AR of the assessee relied upon the decision of Tribunal in Samson Perincherry vs. ACIT in ITA No. 4625 to 4630/M/2013 dated 11.10.2013, which is affirmed by Hon'ble jurisdictional High Court in CIT vs. Samson Perincherry ITA Nos.1154, 953, 1097 and 1226 of 2014 dated 05.01.2017.

4. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR for the revenue submits that during the survey action, a diary was impounded which contains incriminating evidence with regard to certain unaccounted receipt and payment of money. The assessee was confronted with regard to the contents

mentioned on page no. 183 of said diary. The assessee admitted in his statement recorded under section 131 on 27.04.2012 about unaccounted cash of Rs. 15 Lacs. The said cash transaction were not recorded in the books of account nor disclosed by assessee in original return of income. The assessee is not eligible in any leverage or any leniency. The assessee has not challenged the validity of notice under section 153C and has accepted by filing return of income. The assessee now cannot challenged the validity of notice under section 153C by taking plea that the assessee was covered only on survey and no search action was carried out on the assessee or no incriminating material was found in the search conducted on the group. The Id DR prayed for dismissal of the appeal.

5. We have considered the submissions of both the representatives and perused the record. There is no dispute that a search was conducted on Mandhana Industries Ltd. And a survey on M/s Golden Seam Textiles Pvt. Ltd. Further, there is no dispute that in survey a diary was impounded, wherein certain incriminating evidence was found. Further, there is no dispute that the statements of assessee are recorded only under section 131 and the assessee offered additional income of Rs. 15lacks . Further, there is no dispute that additional income offered by assessee was accepted by Assessing Officer without any variance. Perusal of assessment order dated 27.03.2015 passed under section

143(3) r.w.s 153C, reveals that the Assessing Officer initiated the penalty under section 271(1)(c) without specifying any limb of charge or invoking the provision of Explanation 5A of section 271(1)(c). The Id. AR of the assessee has placed on record the statement of assessee recorded under section 131 on 11.01.2012 and 27.04.2012. It was brought to our notice that during the statement recorded on 27.04.2012, in Question No. 4, the Investigating Team confronted with the assessee fact that *“during the course of survey under section 133A of the I.T. Act, 1961 at 45, Heggadadevanapura Village, Golden Palm Resort Road, Bangalore-562123, Inter alia, a red Kotak Diary (Pages 1 to 197) was impounded as Annexure ‘A/GST/1’ on 11/01/2012. The said diary is said to be belonging to you”*. This fact clearly suggest that a only a survey under section 133A was carried out at the assessee.

6. Admittedly, no statement of assessee was ever recorded under section 132(4) by investigation team. Though, admittedly a notice under section 153C, was served upon the assessee and in response to the notice, the assessee filed his return of income and offered the additional income disclosed during the survey, while filing the return of income. The additional income was accepted by Assessing Officer without any variance. There is no evidence against the assessee which may suggest that the case of assessee was covered under section 132, except narration by assessing officer in the assessment order. Rather, the

statements recorded by Investigating Team itself clearly suggest that the case of assessee was covered by survey action only.

7. The Assessing Officer while passing the assessment order invoked the provision of Explanation 5A of section 271(1)(c) specifically deals with the search initiated under section 132 and not for survey action under section 133A.
8. We have further noted that before passing the order, the Assessing Officer issued notice under section 274 r.w.s 271(1)(c) dated 27.03.2013 and again on 04.09.2014. The Assessing Officer recorded that assessee filed his reply in response to the show cause notice. The Assessing Officer in his order has not mentioned the contents of reply in response to notice. The Assessing Officer simply recorded that the statement of assessee was considered but not found acceptable on the ground that (i) during the search, the assessee admitted unexplained money, (ii) the assessee has not approached the appellate authority, (iii) the assessee furnished inaccurate particulars, (iv) the case of assessee is covered by Explanation 5A and (v) the assessee indulged in avoiding the legitimate tax. The assessing officer by invoking Explanation 5A to section 271(1)(c) levied the penalty @ 100% of the tax sought to be evaded.
9. As noted above, the Explanation 5A is not applicable in the present case. As the case of assessee was not covered by search action, rather a

survey action was carried out. We have noted that though the assessee has not challenged the issuance of notice under section 153C. on our specific question to the Id AR for the assessee the Id AR for the assessee submitted, since the return of income filed in response to the notice under section 153C was accepted without any variance and due to the ignorance the assessee has not challenged the validity of notice under section 153C. In our considered view, the assessee is not precluded from raising objection against the validity of notice under section 153C, if the same was not valid and warranted on the facts of the case.

10. We are conscious of the fact that the present proceeding are related to the validity of penalty levied under section 271(1)(c). As noted above, the additional income offered by assessee in his return of income has been accepted by Assessing Officer. The fact of “concealment of income” and “furnishing inaccurate particulars of income” can be established with reference to the income declared in the return of income. In the present case, the income declared in the return of income has been accepted; therefore, it cannot be the case of “concealment” or “furnishing inaccurate particulars” of income. In our view there is no occasion for the assessee to evade the tax as the assessee offered the additional income declared during the survey

action while filing the return in response to the notice under section 153C.

11. In view of the above discussion, when the income declared in the return of income was accepted without any variance. The assessee has neither concealed the income nor furnished any inaccurate particulars of income while filing return of income.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 14 /01/2020.

Sd/-
S.RIFAUR RAHMAN
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 14 .01.2020

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Copy of the Order forwarded to :

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| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "G" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai